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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 227.

TWIN PORTS OIL COMPANY, A CORPORATION,
Petitioner,

vs.

THE PURE OIL COMPANY,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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INDEX

	Page
Case Not Tried on Margin Theory	1
Respondent Changes Its Theory	9

TABLE OF CASES CITED

Adams, et al., vs. Mills, et al., 286 U. S. 397, 76 L. Ed. 1184, 52 S. Ct. 589	9
Chattanooga Foundry Co. vs. City of Atlanta, 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65	7
Rankin vs. Associated Billposters, 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167; also 42 Fed. (2d) 152, Cert. denied 282 U. S. 864, 75 L. Ed. 765	7
Southern Pacific Co. vs. Darnell-Taenzer Lbr. Co., 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186	9
Stevens vs. Foster, 61 S. Ct. 210	5
Story Parchment vs. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248	11
Straus vs. Victor Talking Machine Co., 297 Fed. 791	6
United States vs. Socony Vacuum Oil, 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811	2

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CASE NOT TRIED ON MARGIN THEORY

In respondent's brief the granting of the writ is objected to because it is claimed that the case was tried on the margin theory and that, there being no disproportionate increase between the tank car price rise at Tulsa and the retail prices at Duluth, petitioner was not damaged.

The case was *not* tried on the margin theory. The margin theory was in the case originally, being based upon one of the Madison convictions—Madison Case No. 2, the jobber-margin case.

The *original* complaint alleged the tank car price-fixing (Paragraph 30, R. 15) without any reference to "no proportionate increase" in retail prices (Paragraph 30, R. 15) but the complaint *also* alleged that prices were increased at Group III, the Tulsa area, without a proportionate increase in retail prices at Duluth (Paragraph 34, R. 16-17). This

was based upon the margin theory and based upon the judgment of guilt in Madison Case No. 2, the *nolo contendere* case.

The indictment in Madison Case No. 2 (R. 44) charged that there *was* a conspiracy to fix and regulate *margins* (R. 51-52).

But before the trial Madison Case No. 2 was stipulated *out of the case* and the complaint was amended to bring this about.

This answers the margin theory. There was left and tried the price-fixing case, permissible under paragraph 16 (R. 70-71), amended, amended complaint). But the evidence as to the $2\frac{1}{4}¢$ illegal exaction was received without objection (R. 228, 236).

The claim that the *statements* to the Court preceding the amendment of the complaint *limited* the effect of the *amendment* is not sound. Inasmuch as the amendment was *permitted*, the *amendment* governs. It cannot be *interpreted* by nor *modified* by any colloquy between Court and counsel.

However, in urging the Court to permit the amendment, counsel for petitioner stated that by the amendment petitioner sought a recovery upon "both" theories,—that is, the margin theory *and* the *price-fixing* theory (R. 105-106).

After the decision in *United States vs. Socony Vacuum Oil*, 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811, wherein, in a footnote, examples were given showing a disproportionate increase between tank car prices and retail prices of some 3/8ths of a cent, petitioner, to make sure its case would *not be determined solely on the margin theory* sought, and the Court permitted, the amended paragraph 22 (R. 72-73). This is the paragraph which states that there was a *price increase* and from which the allegation of *proportionate* increase, as appeared in the original complaint (Paragraph 34, R. 16-17) was *eliminated*.

Paragraph 34 of the original amended complaint (R. 16) starts out as follows: "That at all times herein set forth there was a good, adequate, sufficient and normal supply of crude oil and gasoline on hand."

This is followed by the allegations as to difference between tank car prices and retail prices, and in the 11th and 12th lines of paragraph 34 (R. 17) the words "proportionate increase" appear. This allegation was drawn with the margin theory in mind and at the time Madison Case No. 2, the margin case, was in the picture.

But the amended, amended complaint changed this situation. Paragraph 21 of the amended, amended complaint (R. 72) starts out the same as paragraph 34 of the original amended complaint—"That at all times herein set forth there was a good, adequate, sufficient and normal supply of crude oil and gasoline on hand." Paragraph 21 continues as did paragraph 34 of the original complaint (R. 16-17) with allegations that there was no reason for the advance in tank car prices, but the words "proportionate increase" do not appear in paragraph 21; neither do they appear in paragraph 22 (R. 72-73).

It is true that in paragraph 22 the word "margin" appears. This word is used loosely, but paragraph 22 (R. 72) does contain the language: "The tank car prices of gasoline were caused to be and were increased by said defendants at said basic price area" (R. 72).

Paragraph 22 alleges that plaintiff was damaged in the sum of 2¢ per gallon "for each gallon of gasoline sold by it by reason of said conspiracy." There was a plain typographical error here. The word "sold" should have been "purchased." But regardless of the pleadings, the proof of the conspiracy and the proof that it caused the illegal price rise of 2¼¢ went into the record without objection and, under the liberal rules, the pleadings must be deemed to have

been amended to conform to the facts proven.

The record showed the *purchase* by petitioner. It is silent as to *sold* by petitioner. Here, again, the liberal rules come into play fitting the pleadings automatically to the facts.

Despite the fact that the "margin" case, Madison Case No. 2 was stipulated out of the case, the word "margin" was not wholly eliminated in the pleadings. There was a possibility, too, of some marginal proof, although petitioner did not rely on this, certainly not after the testimony of John Cox (R. 228, 236). However, any allegations as to margin must be treated as surplusage.

And, again, we go back to the proposition that the evidence of the illegal exaction was received without objection as beyond the pleadings or stipulation and the pleadings must be treated as amended to conform to the facts.

As showing the pleader's attempt to protect itself in paragraph 36 (R. 75), it is alleged that "plaintiff sold one million, six hundred ten thousand, one hundred thirty-five (1,610,135) gallons of gasoline," and then it is alleged that "because of said conspiracy *and* the narrowed margin" plaintiff was damaged "to the extent of $0.0204 per gallon."

Here there is an allegation of damage because of the conspiracy, which is the price-fixing conspiracy, *and* the narrowed margins. The two conspiracies were clearly in the pleader's mind. One of them was proven.

The same thing applies in paragraph 38 (R. 76) where it is alleged that "by reason of all the facts aforesaid *and the effect of said conspiracy* this *plaintiff* was * * * *injured* in its business and property."

Here the word "conspiracy" in the singular is used. The same thing is true in paragraph 39 (R. 77) where the word "conspiracy" appears. At the outset there were the two conspiracies, the price-fixing conspiracy and the jobber-margin

conspiracy, Madison Case No. 2. The parties eliminated Madison Case No. 2.

If there be some inaccuracies or some looseness appears in the pleadings, this becomes of little moment when the facts were received without objection and, particularly, is this of little moment in view of the liberal new rules as to pleadings. (See *Stevens vs. Foster*, 61 S. Ct. 210.)

During the trial of the case the word "margin" was used by counsel and witnesses, but *at no place was there a direct claim that the petitioner's right to recover was a 2¼¢ marginal difference between prices before and after the conspiracy;* that is a claim of *that* difference between retail prices and tank car prices. The claim was the illegal exaction of 2¼¢ per gallon.

The price-fixing conspiracy started in February, 1935 (Indictment, R. 36-37).

The jobber-margin case, Madison Case No. 2, charged a conspiracy starting in 1931 (Paragraph 11, R. 51).

The *petitioner* did not offer any *selling* prices in evidence. These were offered at the instance of the *Pure Oil Company.*

> "Mr. Searls: *I* want to offer all of the *selling* prices shown on this Exhibit A, attached to our answers of those interrogatories" (R. 130).

Following this the record shows—

> "Mr. Michel: I am not going to offer them" (R. 130).

Little attention was paid to margin during the trial, except with the idea of *explaining* the whole situation.

The margin theory was merely in the case *as a part of the picture.* It appeared that in 1935 and 1936 the margin of petitioner was 1.434 (R. 154).

The following quotation is illustrative as to the mere explanatory nature of the margins:

"Mr. Michel: What margins did you receive for handling gasoline, let us take some six or seven years previous to (fol. 213, R. 155) this buying program period.

Mr. Searls: I *object* to that * * *.

Mr. Michel: Oh, no—as bearing upon the prices and what you should have *paid*, we have a right to go back a reasonable number of years *to show how business was ordinarily conducted in an ordinary open and free market*" (R. 155).

See *Straus vs. Victor Talking Mach. Co.*, 297 Fed. 791.

The following also occurred:

"Mr. Michel: No. We want to go back a sufficient number of years to show that when *purchases* were made in *a free and open market not hampered by the buying programs* or the conditions that existed, what the margins were, as compared to what the margins were here, and it will be followed with further testimony. I think it is clearly material to show what they *normally* get" (R. 156).

To the above counsel for the Pure Oil Company objected. We quote from the Record:

"Mr. Searls: I would like the record to show further that that would be *too remote* to him and that you cannot establish facts of injury or facts of damages *by going back to some prior year* when the *claim* in regard to the conspiracy *relates to 1935 and 1936*, and he has got to look to *those* years to see what occurred and not the fact as to *what he might have received in 1926*, that would have no bearing upon what he would receive in 1935 and it would be entirely too remote and conjectural" (R. 156).

The margin conspiracy started in 1931 (R. 51).

The Court sustained the objection as to previous margins, even upon the explanatory theory (R. 156). So that up to that point certainly margins were not in the case. However,

the Court did permit general testimony that a jobber had to receive a margin of from 3 to 3½¢ per gallon in order to operate successfully (R. 157).

Perhaps upon this testimony alone some damage appears, under the doctrine of *Rankin vs. Associated Billposters*, 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167; also 42 Fed. (2d) 152, Cert. denied 282 U. S. 864, 75 L. Ed. 765, and certainly from the above, it appears that upon some theory this damaged jobber had a right of action.

When the testimony as to the *effect* of the buying programs went into the record without *objection* (R. 228-236), petitioner *quit*, so far as showing any further or other *effects* of the conspiracy. Other than the cross-examination of John Cox and some other and general explanatory testimony by Milan Lubratovich (R. 237-249) plus offering of exhibits, petitioner's testimony closed with the 2¼¢ "floor" testimony of John Cox so far as the effect of the buying programs was concerned.

The testimony of John Cox was that the buying programs *raised the price* of gasoline to the petitioner and put a *"floor" under the market* of 2¼¢ per gallon (R. 228-236). This *made a case* for petitioner under *Chattanooga Foundry vs. City of Atlanta*, 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65.

Respondent recognized this situation. This is shown by its cross-examination of John Cox on the price rise. He had testified that the buying programs put a "floor" of 2¼ cents under the tank market prices (R. 228-236).

We quote from the cross-examination:

> "Q. It is very important to you personally to have a (fol. 316) precedent established giving a jobber *a right to recover by reason of these buying programs* you have referred to?
>
> A. No. I think the *buying program* is of very *little* interest to *me*.
>
> Q. You have consulted attorneys about bringing a suit *by reason of those buying programs?*

A. Yes.

Q. And the *character of suit* you would bring would be a suit *similar* to the one that is being prosecuted here?

A. Yes, but *the point you are asking me about doesn't enter into my case*" (R. 228-229).

And further:

"Q. Just a minute. Answer my question. My question was this: You are very interested in having a precedent established *giving a jobber the right to recover by reason of these buying programs* you have referred to?

A. I think I answered that.

Q. Is it yes or no?

A. It is neither. My interest—" (R. 229).

Again from the cross-examination of John Cox we quote:

"A. My case is a *different kind of a case;* it doesn't have this question.

Q. But you will be claiming damages *by reason of these buying programs* you referred to?

A. I am claiming damages because of monopoly (fol. 318).

Q. You will be claiming damages *by reason of these buying programs* you have testified about?

A. *Not in the way that the Twin Ports case is being presented*" (R. 230).

When the John Cox testimony was concluded, petitioner had shown a cause of action for the illegal exaction of 2¼¢ per gallon, and while the word "margin" had appeared in the pleadings and in the testimony, *the moment petitioner felt it had proven a case for the 2¼¢ illegal exaction*, petitioner *ceased any efforts to make further proof* as to its damages, save the testimony of Milan Lubratovich as to values.

Petitioner felt its case was proven; the John Cox testimony went in without objection as to being beyond the pleadings or the stipulation. Excerpts from the record following the

John Cox testimony show no evidence in an attempt to bolster the claim of a marginal damage nor any damage because of the judgment of guilt in Madison Case No. 2, the jobber-contract case.

RESPONDENT CHANGES ITS THEORY

When this case was presented to the Circuit Court of Appeals it must have become *evident* to respondent that *it could not sustain the trial court's position*, wherein he stated:

> "It is uncontradicted in the evidence that the *price* of gasoline to the jobber *as a result of this conspiracy was increased*, but it is also uncontradicted in the evidence that the retail price of gasoline assumed a corresponding increase, at least in so far as the Twin Ports Oil Company was concerned, and that any increase to the Twin Ports Oil Company in the price of gasoline was *passed on to the retailer*" (R. 253-254).

Under the cases of *Southern Pacific Co. vs. Darnell-Taenzer Lbr. Co.*, 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186, and *Adams vs. Mills*, 286 U. S 397, 76 L. Ed. 1184, 52 S. Ct. 589, the "passed on to the retailer" theory urged upon the trial court by respondent, and which theory he accepted, is clearly untenable.

Respondent urged and the Circuit Court impliedly conceded that this *was the rule* in cases under the Interstate Commerce Act, but said that the same rule did *not apply* in cases under the Sherman Act. (See the two statutes, page 35 of petition herein.)

And the respondent convinced the Circuit Court of Appeals that there *was a difference* between these two statutes. Clearly, for purposes of statutory construction the statutes are the same.

The Circuit Court accepted respondent's contention and

attempted to *distinguish* the Darnell and Adams cases because of the claimed difference in the statutes.

Respondent in its brief in the Circuit Court of Appeals strongly urged this point. But *now*, in objecting to the granting of the writ, respondent *does not attempt to sustain the untenable position taken by the Circuit Court*—that the Darnell and Adams cases are not controlling because of the *differences in the statutes* under consideration.

This contention of inapplicability of the Darnell and Adams cases *was the point* upon which respondent *prevailed* in the Circuit Court.

The Circuit Court said:

> "Therefore, appellant *was constrained* to *base its claim to recover* upon rules announced in cases involving *fundamentally differing enactments* and distinctive grounds for relief. In this connection its counsel cite specifically *Southern Pacific Company, et al., vs. Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531, and *Adams vs. Mills*, 286 U. S. 397" (R. 342).

It will be seen that the Circuit Court said the "claim to recover" was based upon "rules announced in cases," etc.

If the rule in the Darnell and Adams cases does *not* apply, that is one thing, but if that rule *does* apply, the "passed on to the retailer" theory must fall. Then the decision of the Circuit Court is *based upon an unsound premise*, to-wit: that there is a *difference* in the damage section of the Interstate Commerce Act and the Sherman Act—*not* the margin theory.

A mere reading of the two statutes (page 35 of Petition herein) shows that they are *substantially the same* in the matter of damages, *full* damages in one case and *threefold* in the other.

Respondent prevailed upon a wrong theory in the Circuit Court of Appeals.

Viewing this case from any angle, it should go back for

a determination by the tribunal Congress intended to have try questions of fact. The Supreme Court of the United States has said that this tribunal is the jury, in cases under the Sherman Act.

Story Parchment vs. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

Respectfully submitted,

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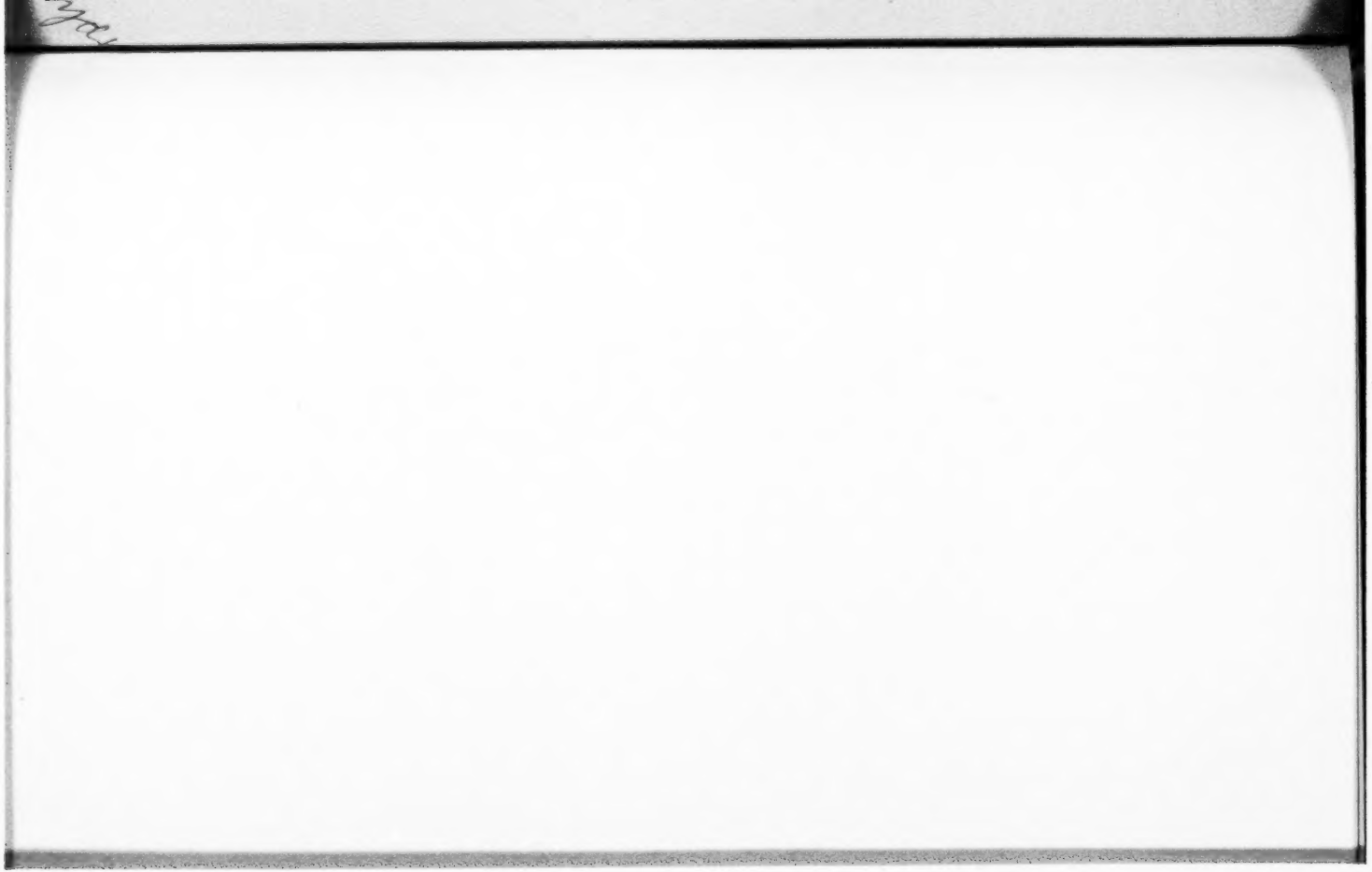

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To the Honorable, the Supreme Court of the United States:

Comes now the Twin Ports Oil Company and asks that this Court reconsider the petition for a writ of certiorari herein, and respectfully shows to this Court:

That the decision of the Circuit Court of Appeals not only held that this case was tried on the margin theory, but also held that petitioner tried the case on the illegal exaction theory, the Court saying:

> "Therefore, appellant was *constrained to base its claim to recover upon rules announced in cases involving fundamentally differing enactments and distinctive grounds for relief.* In this connection its counsel cite specifically *Southern Pacific Company, et al., vs. Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531, and *Adams vs. Mills*, 286 U. S. 397. The first of these cases involved an order by the Interstate Commerce Commission of reparation for unreasonable freight charges, and the carrier was directed to pay such charges to the one

who had paid the unreasonable excess, as the proximate loser, without following each transaction to its ultimate result."

That the decision of the Circuit Court of Appeals, if not reversed, will stand as a precedent for this proposition of law, to-wit:

If a purchaser is *forced to pay an excessive and illegal amount because of a conspiracy to violate the Sherman Law* (*Chattanooga Foundry Co. vs. City of Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65), the fact that the purchaser might get the increase back, or pass it on to the retailer constitutes a defense.

This Court has said in two cases—*Adams vs. Mills*, 286 U. S. 397, 76 L. Ed. 1184, 52 Sup. Ct. 589, and *Southern Pacific Co. vs. Darnell-Taenzer*, 245 U. S. 531, 62 L. Ed. 451, 38 Sup. Ct. 186, that the fact that plaintiffs were able to pass on the damages to subsequent purchasers *would not constitute a defense.*

The Adams and Darnell cases were based upon the Interstate Commerce Act. The Circuit Court of Appeals conceded the correctness of those decisions, but held that a *different* rule applied in cases under the Sherman Law. The damage portions of the two statutes are practically the same.

In the United State District Courts in the state of Minnesota actions by some forty jobber plaintiffs are now pending to recover damages because of losses they sustained by reason of the conspiracy for which defendant and other major oil companies were held guilty. (*U. S. vs. Socony Vacuum Oil*, 310 U. S. 150, 84 L. Ed. 1129, 60 Sup. Ct. 811.)

While we realize that the denial of a petition for a writ of certiorari imports no opinion on the merits of the case, nevertheless, the decision in the present case by the Circuit Court of Appeals *stands as authority* for this:

If there be an illegal exaction, due to a violation of the

Sherman Act, the fact that the exaction was or might be passed on to the public constitutes a defense.

This, under the decisions in the Adams and Darnell cases, does *not* constitute a defense. Those cases were under the Interstate Commerce Act, a statute, so far as damages are concerned, practically the same as the Sherman Act.

In the cases of the some forty jobber plaintiffs pending in Minnesota the jobbers will be confronted with the decision of the Circuit Court of Appeals as holding that the fact that the increase might be passed on to the retailer constitutes an absolute defense.

It may be that in denying the writ herein this Court was of the opinion that the present case was tried on the margin theory, but the decision of the Circuit Court of Appeals went further and squarely held that a jobber could not recover for an illegal exaction charged against it, if it did, or might have, passed this exaction on to the public.

The Circuit Court went beyond the margin theory. It considered the illegal exaction of 2¼ cents per gallon but held the Adams and Darnell cases to be inapplicable, even assuming the illegal exaction.

To the end that the decision of the Circuit Court of Appeals in this case be brought into harmony with *Southern Pacific vs. Darnell*, 245 U. S. 531, 62 L. Ed. 451, 38 Sup. Ct. 186, and *Adams vs. Mills*, 286 U. S. 397, 76 L. Ed. 1184, 52 Sup. Ct. 589, we file this *unusual request* for reconsideration of the petition for certiorari.

This application is filed with the full knowledge that it is of a type which rarely is granted and which in most instances should not be granted.

We cannot but feel that the confusion which may have arisen as to whether this case was tried solely on the margin theory may have been the cause of the denial of the petition.

The instant case, in and of itself, is important, but of little

importance compared to the cases of some forty jobber plaintiffs who now face a situation where the decision of the Circuit Court of Appeals must be taken as final authority in the Eighth Circuit, to the effect that if an illegal exaction was or might be passed on to the public, that would constitute a defense in an action under the Sherman Law. Such is *not* the law in this Court, and the *wrongful precedent* set by the Circuit Court should not control future litigation.

Respectfully submitted,

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